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MONTANA PROSECUTOR

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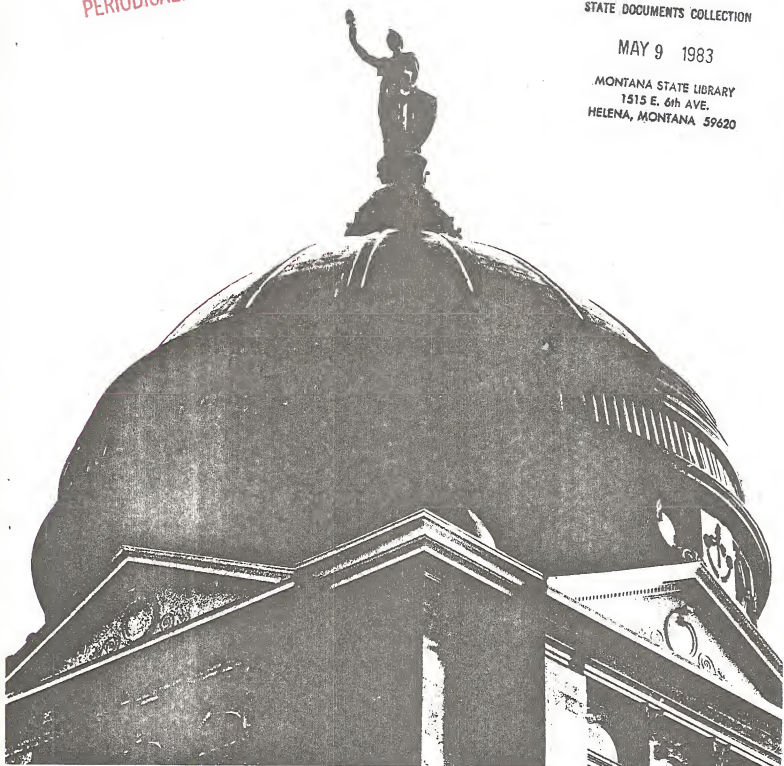
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INTRODUCTORY NOTES

EXTRADITION FORMS

The forms that have been approved by the Governor's Office and the Attorney General can be procured from Karen Ferreira, County Prosecutor Services Bureau, Justice Bldg., 215 North Sanders, Helena, Montana 59620, (449-3816).

NDAA MID-WINTER CONVENTION

The report of Robert L. Deschamps, the Montana Director for the National District Attorneys Association, covering the Mid-Winter Convention is included herein.

JAIL STANDARDS COMMISSION

Also enclosed is the report of Teton County Attorney Russ Andrews concerning the present status of the Jail Standards Commission.

ANNUAL CONVENTION

The tentative schedule of events for the summer meeting and the registration fees are as follows:

WEDNESDAY - JULY 20, 1983

12:30 p.m. - 3:00 p.m.	Registration
1:30 p.m. - 2:30 p.m.	Board of Directors
2:30 p.m. - 3:00 p.m.	Medicaid Fraud
3:00 p.m. - 3:15 p.m.	Break
3:15 p.m. - 4:00 p.m.	
	(Dinner on your own)

THURSDAY - JULY 21, 1983

7:30 a.m. - 8:15 a.m.	Registration
8:15 a.m. - 10:15 a.m.	Supreme Court Impact Decisions - Moylan
10:15 a.m. - 10:30 a.m.	Break
10:30 a.m. - 12:00 noon	History of the Law Of Evidence - Moylan
12:00 noon - 1:15 p.m.	Lunch (Association)
1:15 p.m. - 2:15 p.m.	Burdens of Proof
2:15 p.m. - 2:30 p.m.	Break
2:30 p.m. - 4:30 p.m.	Trial Tactics
4:30 p.m.	Hospitality Room
6:00 p.m.	Children's Dinner
7:00 p.m.	Children's Movie
7:30 p.m.	Association Dinner
(4:30 p.m. - Joggers/Stridders Fun Run)	
	Register Early

FRIDAY - JULY 22, 1983

9:00 a.m. - 10:30 a.m.	Attorney General's Office-Supreme Court Update
10:30 a.m. - 10:45 a.m.	Break
10:45 a.m. - 11:15 a.m.	Mike Greely
11:15 a.m. - 12:00 noon	
12:00 noon - 1:30 p.m.	Lunch (Association)
1:30 p.m. - 2:15 p.m.	
2:15 p.m. - 3:00 p.m.	
3:00 p.m.	Golf, Bridge, Tennis Tournaments
6:00 p.m.	Children's Dinner
6:00 p.m.	Association Cocktail Party (Poolside)
7:00 p.m.	Children's Movie
7:30 p.m.	Association Banquet

SATURDAY - JULY 23, 1983

9:00 a.m. - 10:00 a.m.	Committee Report
10:00 a.m. - 11:00 a.m.	Appointment of Com- mittees
11:00 a.m. - 12:00 noon	General Business
12:00 noon	Adjourn

REGISTRATION FEES

County Attorneys and Deputies	\$55.00
Spouse	\$25.00
Adult Children	\$20.00
Children (7 years to 18)	\$10.00
Children (6 years and under)	Free

The program of instruction has been certified and 8 hours of CLE credit has been approved. Reservations at Fairmont should be made in the near future (Phone No./797-3241).

RECENT CASES AND NOTES

SEARCH WARRANTS - PROBABLE CAUSE - AFFIDAVITS - INCORPORATION BY REFERENCE

Where a search warrant contained too many generalizations, it was saved by form language that incorporated an underlying affidavit. While a particularized affidavit will not ordinarily cure a general warrant, when the warrant is accompanied by an affidavit that is incorporated by reference, it may be used in construing the scope of the warrant. If, when the warrant and affidavit are read together, they describe the items to be seized with "sufficient particularity," they may withstand constitutional challenge. Two paragraphs of the warrant consisted of general references to "instruments of a criminal offense" and "property obtained in the commission of a crime," but the Court concluded that these references related to a specific crime, the manufacture and sale of illegal drugs. The interpretation followed from the list of drug related articles specified "in particular" in the latter portions of both the warrant and the affidavit. Although the warrant form was not ideal, the warrant itself did not authorize a broad, indefinite search of the defendant's house, but only one confined to evidence relating to a specific crime. U.S. v. Johnson, 689 F.2d 60, (3rd Cir., 1982).

ABANDONMENT - BAGGAGE - REASONABLE EXPECTATION OF PRIVACY

Where an air traveler suspected of trafficking in drugs appeared willing to leave her baggage at the airport and vociferously denied owning the bags, she effectively waived her Fourth Amendment rights with respect to the bags. The Court held that a person may lose protected privacy interests in luggage by disclaiming its ownership, emphasizing that it was not using the term "abandon" in the traditional property law sense of the word, but rather as a shorthand way of referring to the loss of legitimate privacy expectations. When she tried to leave the airport without her luggage and vigorously denied its ownership when confronted by narcotics officers, she affirmatively indicated no interest in the bags and, thus, no reasonable expectation of privacy as to their contents. U.S. v. Tolbert, 692 F.2d 1041, (6th Cir., 1982).

RIGHT TO PRIVACY - REASONABLE EXPECTATION - GAS TANK OF TRUCK

Where a group of would-be heroin smugglers arranged to transport their wares in a truck, concealed the drug in the truck's gas tank, and kept close surveillance of the truck as it journeyed northward from the Mexican border, they had a reasonable expectation of privacy in the gas tank. The defendants did not own or personally "hire" the truck, but the driver of the truck had been given \$300 by the defendants for their use of the gas tank as a drug cache. Property-law concepts were not determinative of the Fourth Amendment issue involved in the case. "The appellants have met their burden of showing that their arrangements with Sanchez [the truck driver] and their exercise of joint control and supervision of the truck evinced a reasonable expectation of privacy which was illegally infringed by the warrantless search." U.S. v. Perez, 689 F.2d 1336, (9th Cir., 1982).

MIRANDA - CUSTODY - ON-THE-SCENE QUESTIONING - ACCIDENT INVESTIGATION

In two recent cases the Massachusetts Court of Appeals has held that a police investigation into the causes of an automobile accident may turn into a custodial interrogation requiring the giving of Miranda warnings. In Commonwealth v. Merritt, 441 N.E.2d 532, (Mass., 1982), a police officer investigating an accident in which a pedestrian was struck by an automobile spoke to a suspect outside of the building where he lived. The suspect responded affirmatively when the officer asked if he had been driving the vehicle. After he was arrested, he was given Miranda warnings for the first time. The Court held that the defendant was not subjected to custodial interrogation during the initial questioning because the questioning was "limited and routine." The defendant's absence from the scene of the accident and his apparent intoxication tended to make him the focal point of investigation, but these factors were not sufficient to require Miranda warnings. The Court also cited the lack of "objective manifestations" that the suspect's freedom of action was significantly curtailed.

In Commonwealth v. Comolli, 441 N.E.2d 536, (Mass., 1982), a state trooper arrived at the scene of a two-vehicle accident and spoke to the driver of one of the vehicles inside a police cruiser. It was held that certain factors relied upon by the trial judge in suppressing the driver's statements, such as the questioning in the police cruiser and the duration of the interrogation, were of limited value in determining whether the driver was subjected to custodial interrogation under Miranda. Due to the harsh weather conditions at the time of the accident, it could reasonably be expected that questioning at the scene of the accident would take place in a police cruiser. It appeared that although the driver testified that he was in the cruiser for over an hour, he was only questioned for a fraction of that time.

ENTRAPMENT - ROLE OF THIRD PARTY

It has been held that an entrapment defense is not available where an unwitting third party, presented with an opportunity to commit the offense by an undercover police officer, induces a defendant's participation in the offense without specific direction of the police. The third party in this case, one Burnette, had sold cars and other goods to a "sting" operation run by undercover agents. After several transactions, they told him they would do no more business with him unless he brought someone else along. Burnette then recruited the defendant to help him steal more property. The defendant contended that Burnette was "an unwitting agent" of the police, but the Court believed the concept was "a contradiction in terms." In fact, Burnette needed an accomplice and the defendant was induced, as a willing candidate, to act in that capacity. It also appeared that the defendant was predisposed to commit the offense. *State v. Luster*, 295 S.E.2d 421, (N.C., 1982).

PRIVILEGED COMMUNICATIONS - ATTORNEY-CLIENT - PLEA BARGAINING - ATTORNEY'S NOTES

It has been held that plea discussions between a prosecution witness and his attorney were protected by the attorney-client privilege. A trial court's orders requiring the witnesses to testify on cross-examination as to the content of those conversations and compelling counsel to disclose, pursuant to a defense subpoena, all notes and materials concerning the conversations, were protected by privilege, even though the witness' relationship with the attorney was drawing to a close. Access to the content of the conversations had been sought by the defendant in order to confirm his suspicion that the witness obtained critical facts concerning the murders from his defense counsel and used that information to fabricate his testimony against the defendant. The Court ruled that even if the defendant's suspicions about what the attorney told the witness were correct, there was no reason to permit an infringement of the traditional attorney-client privilege. *Littlefield v. Superior Court*, 186 Cal Rptr. 368 (Cal. App., 1982).

SEARCH WARRANTS - PROBABLE CAUSE - PCP - SMELL OF ETHER

Probable cause for a search of a residence for PCP was not found on the basis of the strong smell of ether from the residence, plus the knowledge that this odor is commonly produced during the manufacture of the illegal drug. The Court pointed out that ether has other, legitimate uses, such as an aid in starting engines. Its odor is thus "not sufficiently distinctive to identify the manufacturing of PCP." *U.S. v. Tate*, 694 F.2d 1217 (9th Cir., 1982).

CITIES AND COUNTIES - POLICE

City and county that, in course of operating "911" emergency phone system, negligently failed to respond to call reporting burglary in progress, after assuring caller that help was coming, are liable for wrongful death of caller who was stabbed to death during reported burglary.

A woman who phoned the "911" number to report that someone was attempting to break into her home was assured that police would be sent "right away." Because the complaint writer who took the call negligently recorded the wrong address, police were not dispatched to the woman's home, and she was fatally stabbed by the intruder.

In Riss v. City of New York, 22 NY2d 579 (1968), the New York Court of Appeals found no legal responsibility for the tragic consequences of the city's failure to furnish police protection despite proof of the victim's repeated and agonized pleas for assistance. The court concluded: "[T]here is no warrant in judicial tradition or in the proper allocation of the powers of government for the courts, in the absence of legislation, to carve out an area of tort liability for police protection to members of the public. Quite distinguishable, of course, is the situation where the police authorities undertake responsibilities to particular members of the public and expose them, with adequate protection, to the risks which then materialize into actual losses." As the court notes, when a relationship is created between the police and an individual that gives rise to a special duty, the municipality loses its governmental immunity and liability may result.

Whether the victim in this case was a person to whom the city and county owed a special duty so as to be accountable for negligence in the performance of that duty is the question. The city and county argue that in maintaining the 911 emergency call system for the public generally, they assume no special obligation to protect the victim, and that, therefore, the case is governed by the holding of no liability in Riss.

This argument misses the mark. It is not the establishment of the emergency call system to serve the village where the victim resided, standing alone, that creates the duty. It is the holding out of the 911 number as one to be called by someone in need of assistance, the victim's placing of the call in reliance on that holding out, and her further reliance on the response to her plea for immediate help: "Okay, right away." This is not a mere failure to furnish police protection owed to the public generally but a case where the city and county have assumed a duty to a particular person that it must perform in a nonnegligent

manner, although without the voluntary assumption of that duty, none would have otherwise existed. The complaint writer's acceptance of the call, his transmittal of the complaint card to the dispatcher and the dispatcher's radio calls to the police cars were affirmative actions setting the emergency machinery in motion. This voluntary assumption of a duty to act carried with it the obligation to act with reasonable care.

But, the city and county argue, failure to fulfill an undertaking to provide police protection does not result in liability unless it be shown that the police conduct in some way increased the risk. They maintained that the evidence does not establish that the conduct had gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury. In other words, they argue, although the hand may have been set to the task and withdrawn, it has resulted in no harm. This court disagrees.

While there could in this case be no direct evidence that the victim relied to her ultimate detriment on the assurance of police assistance, the circumstantial evidence strongly suggests that she did so. Instead of summoning help directly from the village police or from her neighbors, she waited for the response to her 911 call. Instead of taking her baby and going out the front door where she would have been safe, she remained defenseless in the house.

Nor can this court agree that the proof was insufficient to establish proximate cause. Where different inferences may reasonably be drawn from the evidence, the question is one for the jury. Here, the jury could have concluded that, without the critical mistakes in handling the initial transmission and the subsequent failure to conduct a follow up, a village police car would have arrived in time to prevent the attack or to stop the intruder before he could inflict the final fatal wound to the neck. *DeLong v. County of Erie*, (1982).



"This is Attorney Ferd Dinsnep — He'll be defending me after I get through defending you."

RIGHT TO COUNSEL - DWI CONVICTIONS - RECIDIVISTS

Uncounselled DWI convictions, even though they subject a defendant to only a civil forfeiture, cannot be used for sentencing the same defendant in a later DWI proceeding to a fine and jail term as a third offender. The Court declined to draw a constitutional distinction between criminal offenses and civil forfeiture offenses. "Indeed, the concern about inaccurate and unfair results where defense counsel is not present may become more pressing, not less, when less serious changes are involved, since courts are frequently deluged with such cases and may not be as scrupulous about providing procedural protections." *Schindler v. Clerk of Circuit Court*, 551 F.Supp. 561, (Wis., 1982).

SEARCH INCIDENT TO ARREST - BRIEFCASE - NEW YORK V. BELTON

Relying upon the automobile search case of *New York v. Belton*, 453 U.S. 454 (1981) the Supreme Court of Florida has held that the police may search without a warrant any container that a person is carrying at the time of his arrest. The defendant in this case contended that once the police seized his briefcase from him at the time of his arrest, they needed a warrant to open it. In light of the holding in *Belton* that anything in the interior of an arrested motorist's car may be searched, including closed containers, the Court found the defendant's contention to be illogical. *Savoie v. State*, 422 So.2d 308, (Fla., 1982).

MIRANDA - INTERROGATION - ASKING SUSPECT IF HE KNOWS WHY HE IS IN CUSTODY

No "interrogation" was found when, in trying to ascertain whether a mentally slow suspect understood and wanted to waive his rights, a deputy sheriff asked the suspect if he knew why he was present in the sheriff's office. "It was not 'interrogation' when the deputy asked the appellant if he knew why he had been arrested and brought into the Sheriff's office, because the deputy could not have known such a question would elicit the response 'Yes, I killed Mr. Hammons.' The deputy himself testified that 'At that point I was kind of confused, myself, because I didn't expect him to say anything about it.' Without such custodial interrogation as discussed in *Miranda*, there can be no threats of coercion. Therefore, no violation of the appellant's privilege against self-incrimination occurred." *Colbert v. State*, 654 P.2d 624, 32 CrL 2246, (Okla., 1982).

MIRANDA - SPONTANEOUS OUTBURSTS - OVERHEARD STATEMENTS MADE
TO DEFENDANT'S ATTORNEY

A statement made by a defendant to a lawyer, that was overheard by a police officer, was properly introduced at her trial over a claim that it violated her right to counsel and her attorney-client privilege. At the time of the defendant's arrest, she was given several warnings of her constitutional rights but persisted in making statements to the police in which she admitted shooting the victim. When asked if she wished to make a telephone call, she requested to be put through to a lawyer friend. A police officer made the call for her and then handed the phone to the defendant, who immediately said, "Oh my God, I think I've killed Hy." Although the defendant's right to counsel had attached by virtue of her request to telephone her lawyer, the statement was not induced by any questioning or other actions of the police. The statement was a spontaneous outburst, and its admission did not violate her right to counsel. It also implicated the attorney-client privilege, but the privilege only protects confidential communications, and with both the police officer and another man in the room at the time, defendant obviously did not intend her statement to be confidential. In fact, she took no steps to make it confidential. *People v. Harris*, 442 N.E.2d 1205, (N.Y., 1982).

SCHOOL SEARCHES - USE OF DRUG SNIFFING DOGS

The Fifth Circuit Court of Appeals previously held that although the sniffing of students' lockers or cars by dogs trained to detect drugs is not a search within the meaning of the Fourth Amendment, a school district must have at least a "reasonable suspicion" that contraband is present before it can actually open a locker or motor vehicle. In recently denying a rehearing the Court notes that it did not say in that decision that the school district needs to establish that there is "reasonable certainty" that contraband is present or even that there is "probable cause" to believe that contraband will be found. Instead, it remands the case to the District Court for an evaluation of the reliability of a dog's sniff to establish "reasonable suspicion" on its own. *Horton v. Goose Creek Independent School District*, 693 F.2d 524 (5th Cir., 1982).

STOP AND FRISK - REASONABLE SUSPICION - PRESENCE AT SCENE OF
SEARCH

The mere presence of a person at the scene of suspected criminal activity did not entitle police officers to frisk the person. The officer who conducted the pat down search had no reasonable belief or suspicion that the defendant was armed, and there was no evidence independently connecting

STOP AND FRISK - (CONT.)

him to suspected illegal activity at the scene of the search. The fact that the pat down occurred in a private home did not distinguish this case from Yabarra v. Illinois, 444 U.S. 85 (1979) in which it was held that police who had a warrant to search a bar could not pat down all the bar's patrons. State v. Broadnax, 654 P.2d 96 (Wash., 1982).

ATTEMPT - TO POSSESS NARCOTICS - PRELIMINARY DISCUSSIONS

After he had told a government informer that he wanted to buy cocaine, defendant met with an undercover police officer posing as a drug dealer. The officer gave the defendant a sealed and wrapped package said to contain a kilogram of cocaine. The defendant, however, without opening the package, immediately returned it to the officer. Thereupon the officer refused to open the package until the defendant produced the purchase money, and the defendant refused to come up with the money until the officer opened the package. Finally, defendant left without making a purchase. On these facts the Court declined to find that the defendant had committed the offense of attempt to possess cocaine with intent to distribute because defendant had abandoned his intent to procure cocaine before committing an overt act in furtherance of the crime. U.S. v. Joyce, 693 F.2d 838 (8th Cir., 1982).

SEARCH INCIDENT TO ARREST - BRIEFCASE - NEW YORK v. BELTON

FBI agents placed the defendant in their vehicle following an auto chase. Another agent, who was instructed to drive the defendant's car, inadvertently saw part of a gun protruding several inches from a briefcase inside the vehicle. After pulling out the weapon, he reached inside the briefcase and pulled out a black cloth hood and some documents. Suppressing the documents and hood, the Court ruled that this case did not fit within the incident-to-arrest exception. New York v. Belton, 453 U.S. 454 (1981) was not applicable because the agent's search of the briefcase was not made at the time or place of the arrest. The agent had driven away from the scene of the arrest and completely controlled the defendant's car, so the defendant lacked access to his car and the briefcase. No one had impeded the arrest or tried to prevent the agents from driving away from the scene and, thus there were no exigent circumstances. The handgun was not suppressed because it was within the agent's plain view and was accessible to him. U.S. v. Farinacci-Garcia, 551 F.Supp. 465 (P.R., 1982).

ARREST - WHAT CONSTITUTES - DRAWN GUNS

It has been held that pointing a gun at a suspect who has been stopped on a reasonable suspicion of criminal activity does not necessarily turn the encounter into an arrest requiring probable cause. If the investigatory stop was valid in the first place, the only question was whether the degree of force used was reasonable under the circumstances. The facts indicated that a pickup truck believed to contain a murder fugitive and two other individuals was surrounded by at least 12 police officers, of whom as many as three pointed shotguns at the suspects. This show of force was not unreasonable, considering the potential danger faced by the officers. One of the persons believed to be in the truck was wanted for murder, and the police had been advised that he was dangerous and heavily armed. Moreover, the police had just been to a house where the suspect was thought to reside, where they observed a large assortment of deadly weapons and ammunition. The same circumstances supported a "frisk" of the pickup truck for weapons. "[W]here the police believe that a particular suspect may be armed and dangerous, they should be permitted to 'frisk' his vehicle as well as the individual ***." U.S. v. Merriit, 695 F.2d 1263 (10th Cir., 1982).

On the other hand, another Court held that where the police had no more than a hunch that defendant and two companions were "casing" a store as a potential robbery target, this did not justify their stopping the trio's car and a approaching with drawn guns. Although an investigatory police response involving a stop and possibly a frisk without drawn guns, would have been entirely appropriate, what the officers did constituted a full-blown arrest on less than probable cause. The police had neither information that a crime had occurred or was about to take place, nor any indication that the defendant and his associates were armed and dangerous. People v. Farrell, 457 N.Y.S.2d 260, (N.Y. App., 1982).

CONSENT - JUDGMENTAL ERROR - GOOD FAITH EXCEPTION TO EXCLUSIONARY RULE

Where the police made a judgmental error in relying upon a defendant's apparent consent to search, the exclusionary rule would not bar admission of weapons seized from the truck of a parked car. The prosecution failed to carry its burden of showing a valid consent, but the officers' conduct was not the sort that calls for suppression of otherwise trustworthy evidence. The facts indicated that when a computer check revealed two outstanding warrants against the driver, he was placed in "technical custody" but was not handcuffed. No *Miranda* warnings were given at this time. The police then asked the driver if he would open the

CONSENT - (CONT.)

trunk, and, after hesitating, he did so. Ammunition and automatic weapons were found in the trunk. The Court found that the police had relied in good faith upon the driver's apparent act of consent in opening the trunk and allowing them to look inside. Such error was judgmental and should not be subject to the exclusionary rule. *People v. Zimmerman*, ___ N.Y.S.2d ___, 32 CrL 2379 (N.Y. Sup. Ct., 1983).



Drawing by W. Miller, 1978
The New Yorker Magazine, Inc.

"Do you solemnly swear to tell the truth,
the truth, the truth, truth truth?"



MISSOULA COUNTY

OFFICE OF THE ATTORNEY
MISSOULA COUNTY COURTHOUSE
MISSOULA, MONTANA 59802
TELEPHONE: (406) 721-5700

ROBERT L. DESCHAMPS III

COUNTY ATTORNEY

M E M O R A N D U M

TO: Montana County Attorneys

FROM: Robert L. Deschamps III, Montana Director
National District Attorneys Association

RE: Mid-Winter Convention, Reno, Nevada
March 6 - 10, 1983.

DATE: March 17, 1983

At Missoula County and personal expense I attended the above meeting. Please accept this report on the directors' actions taken at the meeting.

The finance committee, on which I am an appointee, met prior to the regular board meeting. As of March 31, the NDAA had \$288,000 in cash, deposited in various insured accounts. The possibility of acquiring our own building in the Washington D.C. area is being considered in view of our increasingly healthy financial condition. We are also strongly considering a two to four dollar dues increase to enable the Association to add another staff person to review, update, and republish the excellent handbooks that were originally published and distributed with LEAA funds in the 1970's.

At the board meeting reports were given by President Flanagan and President-elect Ed Miller. Both are members of the executive working group, a kind of super law enforcement coordinating committee, made up of six local prosecutors, six attorney generals, and six members of the U.S. Department of Justice. This committee seems to be continuing to cement better federal-state-local relationships in such areas as local law enforcement coordination committees, drug task force strategies, the proposed federal criminal code, etc.

A report was also given on the NDAA's newly created private foundation, the American Prosecutor's Research Institute. To date, little has been accomplished, but a fund raiser at the White House is being arranged.

The membership committee reported that membership is continuing to increase. I noted that Montana has about average membership, with 34 out of 56 county attorneys being NDAA representatives. It was noted that there are some board of directors positions open for deputies who are Associate Members. Dues for Associates

are \$28 per year, and entitles deputies to everything regular members get. Please encourage your deputies to join -- I don't think it would be any problem getting an active Montana Associate on the board of directors.

The juvenile justice section is coming along quite well, focusing on the national problem of facilities; a section newsletter; juvenile conferences geared to prosecutors instead of social workers; and designing a national strategy for recidivist violent youths.

The civil section, of which I am a member, will be sending out a questionnaire to identify common areas of civil law interest so we can design programs of general interest and use. At the summer meeting we plan to offer a program on governmental liability and insurance programs.

As usual, considerable discussion was devoted to prosecutor's less than satisfactory representation within the ABA. For example, the ABA criminal law section filed an amicus brief in favor of exclusionary rule in the recent U.S. Supreme Court case of Illinois v. Gates, dealing with the good faith exception proposal. At the same time the NDAA filed an amicus brief supporting the good faith exception. Again, the only way to control the ABA appears to be increased prosecutor involvement in it.

In this connection, it was reported that section 3.8 of the "Kutak Report" revising the Code of professional responsibility would require prosecutors to control the police on pre-trial publicity.

Also, the ABA is strongly considering a million-dollar plus study and report on prosecutorial discretion. Again, we need to be alert to this and ready to make our views known.

Consideration was made of a proposed NDAA resolution asking the Food and Drug Administration to exercise its authority to limit drug manufacturer's production of various controlled substances. This resolution was tabled until the next board meeting.

The board set the following association priorities for federal legislation:

1. exclusionary rule.
2. revision of federal forfeiture law.
3. insanity defense.
4. habeas corpus reform.
5. justice assistance act.

The big push will be for the justice assistance act, which would reinstate an LEAA-like federal program. You will recall that this

Montana County Attorneys
March 17, 1983
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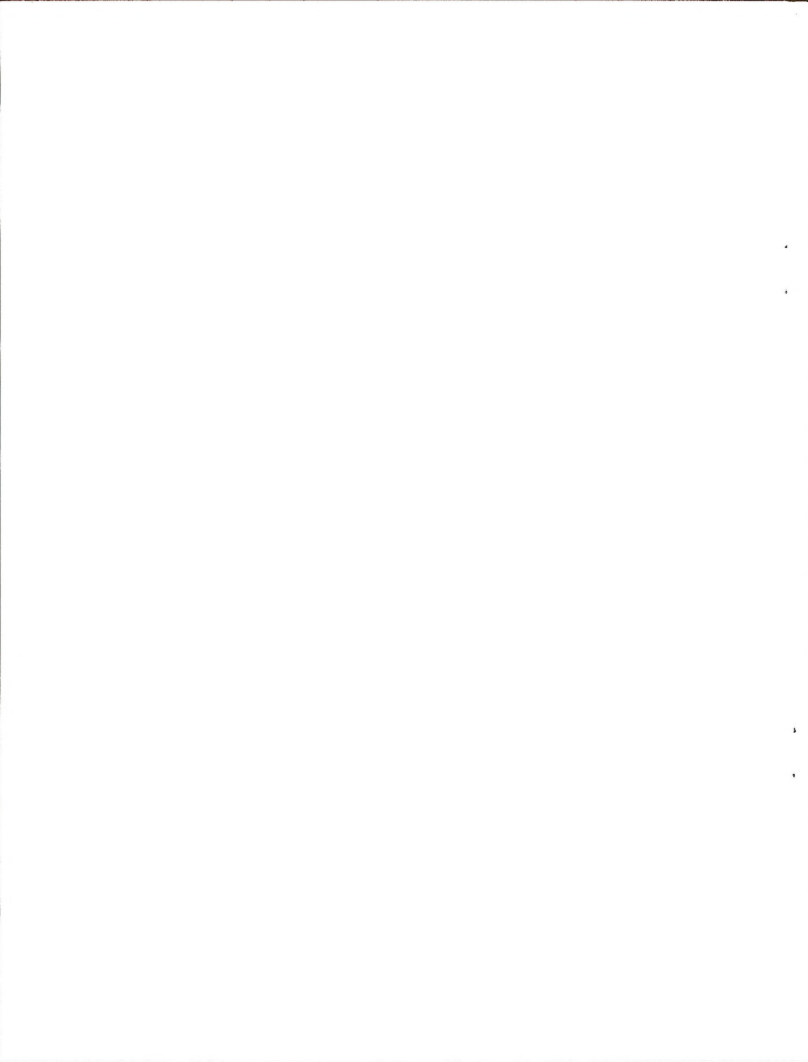
bill cleared both houses of Congress last year, but was vetoed by President Reagan because of some last minute riders creating a "drug czar" etc. We are hopeful the bill will make it this time.

The federal insanity proposal is a McNaughten test with the burden of proof on the defendant by a preponderance of the evidence, and various post-trial commitment procedures. Much debate was had on whether the NDAA should change its position on the insanity defense taken at Boston last summer. Although the vote was divided, no change was made. As a result, the NDAA position is identical to the federal proposal described above.

The board selected Seattle as the site for the summer 1985 convention. This should be an excellent meeting and a great opportunity for a large Montana delegation to attend.

The training and social aspects of the Reno meeting were great. The annual legislative conference in May and the summer convention in Nashville in August look to be as good or better. Why don't you plan on attending one? Of course, if you have any questions or comments on either conference or any aspect of the National District Attorneys' Association, please don't hesitate to contact me.

RLD/dm



OFFICE OF THE COUNTY ATTORNEY

TETON COUNTY, MONTANA
CHOTEAU, MONTANA 59422

RUSSELL R. ANDREWS
COUNTY ATTORNEY

TETON COUNTY COURTHOUSE
(406) 466-2800

March 3, 1983

KEITH D. HAKER
Custer County Attorney
Custer County Courthouse
Miles City, Montana 59301

RECEIVED

MAR 14 1983

Re: Montana Jail Standards Commission/Enclosure.

COUNTY PROSECUTOR SERVICES
Helena, Montana

Dear Keith:

The following is a report on the status of the Jail Standards Commission's effort to develop a proposal for inspection of jails and the implementation of jail standards.

The first meeting following your appointment of the County Attorney Association's Committee took place on January 12, 1983, in Helena. Sheriff Howard provided an agenda designed to move the group toward the creation of a full-time Jail Standards Commission, complete with staff and funding. Immediately prior to the meeting, it became apparent that legislation would be required to accomplish a state-wide Commission and the meeting was devoted mainly to development of said legislation.

The Legislative Council was given a rough outline of proposed legislation and the members of the Commission who were present met with David Boyher of the Council, who proceeded to push the concept to a draft bill for introduction.

The bill was eventually introduced with many changes by the Legislative Council; serious misgivings were voiced by the preparers of the bill and another meeting was called to make the necessary changes.

On February 16, 1983, the Commission met to iron out the bill's problems. However, before the members reached agreement on amendments, Dick Gasvoda, Cascade County Commissioner, and Glenn Osborn, Cascade County Sheriff, voiced doubts about proceeding with the bill in any form whatsoever. Mr. Gasvoda advised the other members that the Montana Association of Counties would probably not support the legislation. I have enclosed a copy of the original bill, which would have been amended in many particulars had not MACO's support been withdrawn.

It was obvious that without support from the Association of Counties the legislation had no chance of passage. And, that to introduce legislation without that support, would prejudice the entire effort to establish a state-wide Commission and, quite probably, doom the chances of eventual adoption of standards. Therefore, the bill's sponsors, Toni Bergene and George McCallum, were requested to withdraw the bill.

The Commission is now in limbo. Due to the absence of support from the Association of Counties, it is obvious that more ground - work needs to be done with that group. However, given the diversity of interests among the Association's members, it is questionable whether legislation can be created which will be satisfactory.

I will await further instructions from the County Attorney's Association regarding this matter. In the meantime, I can only urge those county attorneys with a jail they believe to be constitutionally defective to make that belief known to their Board of County Commissioners, since the potential liability can prove financially devastating to the county and the Board. They should advise their Board that the potential cause of action will make a claim of a violation of civil rights under the constitution and that most insurance policies exclude coverage for such claims, thereby leaving members of the Board individually and personally liable for damages where violations can be proven.

Keith D. Haker
March 3, 1983
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If you have any questions, please advise.

Very Truly Yours,



Russell R. Andrews
Teton County Attorney

Enc. - as noted.

cc: Allin Chetham
Loren Tucker

RRA/jrh